Interscope Versicherung Sdn Bhd v Sime AXA Assurance Bhd (previously known as United Malayan Insurance Co Bhd)

HIGH COURT (KUALA LUMPUR) — SUIT NO S1-22-26-1995
KC VOHRAH J
22 SEPTEMBER 1995

Civil Procedure *— Summary judgment — Affidavit in reply not filed — Defendant applied to stay summary proceedings pursuant to arbitration clause in agreement made with plaintiff — Whether summary proceedings should be heard after disposal of stay proceedings — Arbitration Act 1952 s 6 — Rules of the High Court 1980 O 14*

The plaintiff brought summary proceedings under O 14 of the Rules of the High Court 1980 against the defendant for a sum of RM445,753.98, which was due to him under an agreement. The hearing of the O 14 application was fixed on 21 June 1995. However, on 17 May 1995, the defendant filed an application to stay the O 14 proceedings pursuant to s 6 of the Arbitration Act 1952. The hearing of the defendant's appeal was fixed on 4 July 1995. At the hearing of the O 14 application, the defendant requested for a postponement pending disposal of its application for stay of proceedings. The senior assistant registrar ('the SAR') rejected the request on the grounds that the defendant had failed to file: (i) a certificate of urgency in respect of the stay proceedings so that it could be heard before the O 14 application; and (ii) an affidavit in reply to the O 14 application, which meant that there the defendant did not deny the debt. The defendant appealed against the SAR's decision.

Held, allowing the appeal:

Even though the defendant did not file in an affidavit to oppose the O 14 application, he had filed an application for stay of proceedings relying on the arbitration clause in the agreement. Therefore, the hearing of the O 14 application should have been postponed to a date after the disposal of the stay proceedings. It would seem that if stay was refused, the defendant could apply for leave to defend from the court.

[Bahasa Malaysia summary

Plaintif telah memulakan suatu prosiding terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan untuk suatu jumlah sebanyak RM445,753.98, yang perlu dibayar kepadanya di bawah suatu perjanjian. Pembicaraan permohonan tersebut telah ditetapkan pada 21 Jun 1995. Walau bagaimanapun, pada 17 Mei 1995, defendan telah memfailkan permohonan untuk penggantungan prosiding mengikut s 6 Akta Timbangtara 1952. Pembicaraan permohonan defendan telah ditetapkan pada 4 Julai 1995. Semasa

pembicaraan permohonan A 14, defendan telah memohon agar pembicaraannya ditunda sehingga permohonan defendan untuk penggantungan prosiding selesai. Penolong kanan pendaftar telah menolak permohonan tersebut atas alasan bahawa defendan telah gagal memfailkan: (i) suatu perakuan tindakan segera berkenaan dengan prosiding penggantungan supaya ia boleh dibicarakan sebelum permohonan A 14 tersebut; dan (ii) suatu afidavit jawapan kepada permohonan A 14 tersebut, yang bermaksud defendan tidak menafikan hutang tersebut. Defendan merayu terhadap keputusan penolong kanan pendaftar.

Diputuskan, membenarkan rayuan itu:

Walaupun defendan tidak memfailkan afidavit untuk menentang permohonan A 14 itu, dia telah memfailkan permohonan untuk penggantungan prosiding, dengan bergantung kepada fasal timbangtara yang terdapat di dalam perjanjian mereka. Maka, pembicaraan permohonan A 14 sepatutnya ditunda kepada tarikh selepas penyelesaian prosiding penggantungan. Nampaknya, jikalau penggantungan tidak dibenarkan, defendan boleh memohon untuk kebenaran untuk membela daripada mahkamah.]

[*Editorial note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No W02–664–95.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520.

Case referred to

Pitchers Ltd v Plaza (Queensbury) Ltd [1940] 1 All ER 151 (folld)

Legislation referred to

Arbitration Act 1952 s 6
Rules of the High Court 1980 O 14
Rules of Supreme Court 1883 O 14 [UK]

Su Tiang Joo (*Cheah Teh & Su*) for the plaintiff.
Amudha a/p Jayaraman (*Murali B Pillai & Associates*) for the defendant.

KC Vohrah J: This is an appeal against the decision of the senior assistant registrar ('the SAR') who entered judgment for the plaintiff on an O 14 application.

The plaintiff sued the defendant for payment of a liquidated sum of RM445,753.98 plus interest, being management expenses and commissions due on an agreement made between the parties. In the agreement, the plaintiff was given authority to underwrite on behalf of the defendant

insurance relating to fire and allied perils, miscellaneous accident and marine cargo, in consideration of the defendant paying the plaintiff management expenses and commissions on the gross premium income.

The writ was filed on 18 January 1995, and was served on the defendant on 11 April 1995. The defendant entered appearance on 14 April 1995. The summons in chambers for the O 14 application was filed on 2 May 1995, and hearing for the O 14 application was fixed for 21 June 1995. On 17 May 1995, the defendant filed an application for a stay of the proceedings pursuant to s 6 of the Arbitration Act 1952. The hearing date for this application was fixed for 4 July 1995.

On 21 June 1995, at the hearing of the application for the O 14 application the defendant requested for a postponement of the hearing pending disposal of the defendant's application for stay of the proceedings. The defendant did not file an affidavit opposing the plaintiff's O 14 application. The plaintiff objected to the request on the grounds that the defendant had not filed a certificate of urgency in respect of the stay proceedings so that it could be heard before the O 14 application, and that the defendant had failed to file an affidavit in reply to the affidavit in support of the O 14 application, which meant there was no denial of the debt claimed on the O 14 application. The SAR agreed with the plaintiff and gave judgment to the plaintiff.

It is unfortunate that the case of *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 was not brought to the attention of the SAR. There, it was held that opposition to a summon under O 14 for final judgment may constitute a step in the action. In that case, the plaintiffs sued the defendants by a specially indorsed writ for a sum of money which they alleged to be due to them under a building contract. The contract included an arbitration clause, to be operative on either party forthwith giving to the other notice of any dispute or difference. The plaintiffs took out a summons under the existing O14 of the Rules of Supreme Court 1883 [UK] ('the RSC'), for leave to sign final judgment. The defendants filed an affidavit, and appeared before the master claiming that they had a defence to the action. On the master's giving leave to sign judgment, the defendants appealed against his order, and only then applied for a stay of the action by reason of the arbitration clause included therein.

The Court of Appeal (Slesser, MacKinnon and Goddard LJJ) dismissed the appeal, holding that the defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they opposed the summons for leave to sign final judgment before the master.

Goddard LJ (as he then was) had this to say at p 156:

> For myself, I am not at all satisfied that, if the defendant filed an affidavit in answer to an application for judgment under O 14 of the RSC, although he may raise the arbitration clause, it may not be said that he has taken a step in the action unless at the same time he has taken out a summons to stay the action. Of course, if he has taken out a summons to stay the action which comes on (as, in the ordinary course, it would) at the same time as

> the summons for judgment, and the master refuses the application to stay, and says, 'On the plaintiff's summons, I give judgment,' I should say that there could be no doubt that, in appealing against both the refusal of the master to stay and the order giving leave to sign judgment, the defendant is not taking a step in the action. He has done what he can, by taking out the summons to stay, to get the action referred. If the master has refused that, and the defendant goes to the judge on that, he must at the same time, of course, also go to the judge and say: 'Set aside the judgment, because, if this had gone to arbitration, it would follow that the master would not have given judgment.'

In our case, the defendant prudently did not file an affidavit to oppose the O 14 application, but well before the date fixed for hearing of the O 14 application, the defendant, relying on the arbitration clause in the agreement, filed an application for stay of the proceedings. The hearing of O 14 application should have been postponed to a date after the disposal of the stay proceedings. It appears that if stay is refused, presumably (see the editorial note in *Pitchers* at p 151) the defendant may ask for leave to defend. It is something which will have to be decided later if the need arises.

In my view, the order giving final judgment to the plaintiff should be set aside with costs.

Appeal allowed.

Reported by Azra Azman